

### REMARKS

In the action all of claims 41-50 and 53-137 were rejected, under §112, §102(b) and/or §102(e)

Taking first the §112 rejections, claim 135 was stated as being incomplete in that there was no step recited for deploying a treatment assembly within the body. A step of deploying the treatment assembly within the body cavity is now added to claim 135, and the claim is also amended to recite the treatment of the tissue surrounding the body cavity, since the claim is directed to a method for treating tissue. The claim as amended is believed clear and definite.

Concerning claim 136, the objection was made that the treatment assembly is not a positively claimed element. This is remedied by amending the second paragraph of the claim to recite "at least partially enclosed said treatment assembly for delivering a treatment to body tissue . . . ." The use of the term "said" makes reference back to the introduction of this term in the preamble, and incorporates the preamble term into the claim as a positively recited element. Thus, claim 136 as amended is believed clear and definite.

Regarding claim 41, the Examiner objected to the specification as not providing proper antecedent basis for the element surface relief means recited in claim 41. The applicant

respectfully disagrees. Exact wording need not be duplicated in order to provide support for a term in the specification.

Nonetheless, nearly the exact wording is found in paragraph 66 of the applicant's published publication (fourth to last paragraph in the description portion of the application), as follows:

These surface features, essentially bumps, ridges, grooves or interrupted relief lines, are configured to enhance fluid migration. [Emphasis added.]

This passage is describing Figures 26-30, referring to all of the different balloon texture features as "surface features" and also using the word "relief". This is believed fully to support the use of the term "surface relief means" in claim 41.

Claims 136-137 were rejected as allegedly anticipated by Williams Patent No. 5,611,767. These claims are now amended and Williams, which shows a very different type of device, does not show the features of the amended claims. Claim 136 recites a vacuum conduit and a vacuum source connected to the vacuum conduit at a proximal end of the conduit. This is indicated in Figure 23 of the drawings. An aspirator, which is disclosed in the application as pointed out previously, acts as a vacuum or suction source at the proximal end of the device. Claim 36 recites that the vacuum port is configured to provide suction adjacent to the enclosure device and within the body cavity.

Vacuum ports are shown, for example, at 80 in Figure 23.

Williams discloses no device or portion of his device that can be construed as a vacuum port configured to provide suction adjacent to an enclosure device and within a body cavity. Williams does not discuss use of suction or vacuum and does not include a vacuum port which could provide suction to the region defined in the claim. The Examiner's reference to "raised exterior portion" is not understood, since this term is not present in claims 136 and 137. Nor is the term "configured to be in fluid communication" with a vacuum source.

Claims 136 and 137 define a very different applicator device from the completely implantable intra-operative device of Williams, and Williams does not read on or in any way suggest the device defined in these claims. Accordingly, claims 136 and 137 define patentably over Williams and should be allowed.

Claims 41-50 and 53-137 were rejected over the Lubock patents, with which the applicant seeks interference. The Examiner states that the applicant's declaration under Rule 131 is not sufficient to show an effective filing date prior to the Lubock references. The applicant disagrees. The Rule 131 declaration does clearly explain which facts or data the applicant relies on to show completion of the invention prior to the effective date of Lubock. In the declaration the applicants describe in detail the relevance of each of the exhibits to their

early conception and diligence toward reduction to practice of the invention, and many relevant facts are included in support of that conception and diligence. The Examiner seeking to refute the sufficiency of the declaration says

Entry #17 discusses the use of ribs inside the balloon with a date of 4/30/03 which is clearly after the filing date of the Lubock references clearly not showing "completion" of the claimed invention prior to the filing date of the Lubock references. The declaration appears to show that the device was still being designed and that the device was not completed or reduced to practice prior to the filing date of the Lubock references.

However, "completion" of the invention in the sense of fully reducing the invention to practice is not required to have occurred prior to Lubock's effective filing date. Interference law allows one who is first to conceive but last to reduce to practice to prevail over another who later conceived and filed an application. It is also noted that not all of the applicant's claims under consideration include the feature referenced in entry No. 17.

Further, the Examiner refers to entry #3 in the Rule 131 declaration, discussing Exhibit A. Exhibit A is a notebook entry that reads "Consider having a drain port/membrane on our applicator and catheters, if necessary, to remove seroma." The entry further refers to applying a suction force. The fact that the notebook entry says "consider" incorporating that drain port

does not negate conception of that aspect of the invention. To the contrary, this shows possession of that aspect of the invention and is, in fact, direct evidence that the invention had been conceived at least as early as that date. Further, the exhibits are needed as evidence to back up the statements made by the inventors/declarants but need not tell the entire story. As stated in the declaration, this was not the first conception of the invention of a balloon applicator with provision for drainage from the space between the balloon and the tissue; the entry shows that the inventors had knowledge of this feature at least as early as the date of the exhibit, and the declaration states that the inventors conceived the invention prior to Lubock's filing date. Contrary to what is stated in the official action, the entry, in conjunction with the declaration of the applicants, definitely confirms that the invention with this feature had been conceived prior to the Lubock filing date. Reduction to practice as of that date is not required. The invention as claimed very clearly was conceived prior to Lubock's filing date, accompanied by the required diligence, and it is not relevant that the applicants may have been working on other features.

Accordingly, it is believed the applicants have demonstrated their early conception of the invention, prior to the filing date of Lubock, coupled with the require diligence toward reduction of the invention to practice. All of the pending claims should be

allowed or made the subject of an interference with the Lubock  
patents/applications.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T.M. Freiburger', written over the typed name.

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